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06 UNITED STATES DISTRICT COURT
07 WESTERN DISTRICT OF WASHINGTON
08 AT SEATTLE

09 JACK K. STEIN,) CASE NO. C06-1047-MJP
10)
11 Plaintiff,)
12)
13 v.)
14 KENNETH QUINN,)
15)
16 Defendant.)
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14 Plaintiff is a Washington state prisoner proceeding *pro se* and *in forma pauperis* in this
15 action brought pursuant to 42 U.S.C. § 1983. The essence of plaintiff's complaint is that prison
16 officials violated his constitutional rights when they removed eleven boxes of legal materials from
17 his cell without proper justification. The Court issued an Order to Show Cause on October 31,
18 2006, advising plaintiff to address certain deficiencies in his complaint. (Dkt. #15). Plaintiff has
19 filed a response to the Order to Show Cause. (Dkt. #16). Having reviewed the response, the
20 Court recommends that the complaint and this action be dismissed without prejudice.

21 PROCEDURAL HISTORY

22 On August 21, 2006, plaintiff was granted *in forma pauperis* status and his 1983 complaint

01 was filed. Upon screening the complaint, the undersigned United States Magistrate Judge noted
02 that it appeared that plaintiff was seeking similar relief from the state court. Consequently, on
03 August 22, 2006, the undersigned issued a Report and Recommendation (“R&R”) recommending
04 that the instant lawsuit be dismissed without prejudice pursuant to the abstention doctrine
05 articulated in *Younger v. Harris*, 401 U.S. 37 (1971). (Dkt. #8).

06 On October 27, 2006, the District Judge assigned to this case, the Hon. Marsha J.
07 Pechman, adopted the R&R in part. (Dkt. #14). Judge Pechman concluded that *Younger* was
08 implicated but that a stay, rather than dismissal, would be required if state court proceedings were
09 still on-going. Because the record was not clear, Judge Pechman remanded the case to the
10 undersigned to determine whether state proceedings had terminated and whether the instant action
11 should proceed or be stayed.

12 In accordance with Judge Pechman’s Order, the undersigned issued an Order to Show
13 Cause (“OSC”) on October 31, 2006, directing plaintiff to address whether his state court
14 proceedings had terminated. (Dkt. #15). The Court also directed plaintiff to address three other
15 areas of concern regarding his complaint:

- 16 (1) Whether the eleven boxes had been destroyed, as indicated by one of the exhibits
17 he had provided, rendering the instant lawsuit moot;
 - 18 (2) Whether the removal of the eleven boxes had caused him “actual injury” sufficient
19 to establish standing; and
 - 20 (3) Whether plaintiff agreed to discontinue the use of inappropriate language in his
21 pleadings before this Court.
- 22 (Dkt. #15 at 2-3).

01 On November 13, 2006, plaintiff filed a response to the OSC. He addressed each of the
02 above concerns in his response and the Court will address them in turn.

03 DISCUSSION

04 1. Whether plaintiff's proceedings in state court have terminated.

05 In the OSC, the Court noted that it appeared that plaintiff had one action still pending in
06 the Washington Court of Appeals, Case No. 587684. The Court directed plaintiff to address
07 whether the pending state proceeding had terminated and, if so, to provide evidence thereof. (Dkt.
08 #15 at 2).

09 Plaintiff in his response concedes that Case No. 587684 is still pending in state court.
10 (Dkt. #16 at 2). However, he asserts that the state court proceeding is against a different
11 respondent and has nothing in common with the instant proceedings. Therefore, plaintiff contends
12 that a stay under *Younger* is not required.

13 Plaintiff does not support his assertion with any documents from the state court showing
14 that the proceeding there involves wholly different claims. Thus, he does not conclusively show
15 that the instant proceedings should not be stayed pursuant to *Younger*. However, in light of the
16 other deficiencies noted below, the Court need not rest its recommendation solely upon a finding
17 that *Younger* precludes the instant lawsuit from advancing.

18 2. Whether the eleven boxes had been destroyed, rendering the instant lawsuit moot.

19 In response to the Court's directive that plaintiff show that the eleven boxes have not been
20 destroyed, as indicated unequivocally by one of the exhibits filed earlier (Dkt. #7, Ex. 17), plaintiff
21 asserts that two prison officials have told him that the boxes still exist. (Dkt. #16 at 7). However,
22 plaintiff does not identify these prison officials nor does he support his assertion with any evidence,

01 such as statements from the prison officials themselves. Consequently, he has not satisfied this
02 Court's concern that the instant lawsuit seeking return of the boxes would be an exercise in futility
03 because the boxes have been destroyed.

04 3. Whether the removal of the eleven boxes has caused plaintiff "actual injury."

05 In the OSC, the Court advised plaintiff that, in order to state a claim based upon the loss
06 of the boxes, he needed to allege facts establishing that he had suffered an "actual injury," a
07 jurisdictional requirement that flows from standing doctrine and may not be waived. *See Lewis*
08 *v. Casey*, 518 U.S. 343, 349 (1996). (Dkt. #15 at 2). To show "actual injury," a plaintiff must
09 allege "actual prejudice with respect to contemplated or existing litigation, such as the inability to
10 meet a filing deadline or to present a claim." *Lewis*, 518 U.S. at 348.

11 In his response to the OSC, plaintiff disputes that he is required to show "actual injury,"
12 and contends, instead, that prejudice from the loss of the boxes may be presumed. (Dkt. #17 at
13 7). Plaintiff cites no authority to support this contention. In addition, plaintiff asserts in a
14 conclusory fashion that if actual injury is required, he has met that standard already, and can
15 provide further evidence of actual injury at an evidentiary hearing. (*Id.*)

16 Plaintiff's response is inadequate to answer the Court's concern that he has not established
17 actual injury and consequently has not met the jurisdictional requirement of standing.

18 4. Whether plaintiff agrees to discontinue the use of inappropriate language in his
19 pleadings.

20 In the OSC, the Court noted that plaintiff had referred to a defendant in this action as "an
21 EVIL and dishonest black man. . ." (Dkt. #15 at 3) (emphasis in original). The Court advised
22 plaintiff that such language was inappropriate in a court of law, and cited Local Rule GR 9 as

01 prohibiting the presence of bias or prejudice in any form in litigation in this district. Plaintiff was
 02 warned that further instances of abusive language would result in sanctions, including the possible
 03 dismissal of this action.

04 In his response to the OSC, plaintiff states that he fails to see how the above-quoted
 05 language is inappropriate. (Dkt. #16 at 8). He therefore provides no assurance that he will refrain
 06 from using such language in the future.

07 Again, the Court finds plaintiff's response to be inadequate. By failing to recognize the
 08 problem, plaintiff's response wholly ignores his duty to follow in the future the rules governing
 09 bias-free litigation in this Court.

10 CONCLUSION

11 In sum, plaintiff's response to the OSC falls short on all counts. Plaintiff has failed to
 12 conclusively show that *Younger* does not apply, or to adequately address the deficiencies in his
 13 complaint. Accordingly, the Court recommends that the complaint and this action be dismissed
 14 without prejudice.¹ A proposed Order accompanies this Report and Recommendation.

15 DATED this 8th day of December, 2006.

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 18 Mary Alice Theiler
 19 United States Magistrate Judge
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21 ¹ In so recommending, the Court is mindful that if *Younger* were the sole issue before the
 22 Court, then a stay would be the appropriate remedy instead of dismissal. See *Gilbertson v. Albright*, 381 F.3d 965 (9th Cir. 2004) (*en banc*).